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PETER A. FULLER, INDIVIDUALLY
7 AND DOING BUSINESS AS
PETE FULLER CONSTRUCTION
8

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
11

12 THE UNITED STATES OF AMERICA FOR)
THE USE AND BENEFIT OF PETER A.)
13 FULLER, individually and doing business as)
PETE FULLER CONSTRUCTION,)

14 Plaintiff,)
15)
16)

vs.)
17)
18)

JAMES E. ZOUCHA, an individual,)
19 Defendant.)
20)

No. 2:05-CV-00325-DFL-DAD

**STIPULATION AND ORDER FOR
SETTLEMENT AND TO STAY
ACTION**

21 Plaintiff Peter A. Fuller, individually and doing business as Pete Fuller Construction
22 ("Fuller") and defendant James E. Zoucha ("Zoucha") (collectively, the "Parties"), by and through
their respective counsel, stipulate as follows:

RECITALS

24 1. Whereas a dispute has arisen between the Parties concerning the public works of
25 improvement known as "Replace Well 2014 at Cypress Lakes Golf Course XDAT 02-7506," and
26 "Replace Well 2006 at Cypress Lakes Golf Course XDAT 03-1063," located at Fairfield, California
27 (collectively, the "Projects"), which are the subject of *THE UNITED STATES OF AMERICA FOR*
28 *THE USE AND BENEFIT OF PETER A. FULLER, individually and doing business as PETE*

1 *FULLER CONSTRUCTION v. JAMES E. ZOUCHA*, United States District Court, Eastern District of
2 California, Case No. 2:05-CV-00325-DFL DAD (the "Action").

3 2. Whereas the Parties wish to settle all claims asserted or which could have been
4 asserted in the Action, they enter into this Agreement.

5 **STIPULATION FOR SETTLEMENT AND MUTUAL RELEASE**

6 **A. Payment of the Settlement Amount**

7 1. FOR AND IN CONSIDERATION of the total settlement of the Action,
8 Zoucha shall pay to Fuller an amount not to exceed Four Hundred Forty-Six Thousand Two
9 Hundred Twenty-Seven Dollars and Ninety-Four Cents (\$446,227.94), but no less than Three
10 Hundred Eighty-Four Thousand Two Hundred Twenty-Seven Dollars and Ninety-Four Cents
11 (\$384,227.94) to be determined and paid as follows:

12 **a) Two Hundred Sixty Thousand Nine Hundred Forty-Six Dollars**
13 **and Fifty-Two Cents (\$260,946.52)** to be paid within thirty (30) days of execution of this
14 Stipulation (the "First Settlement Payment"); and

15 **b) One Hundred Twenty-Three Thousand Two Hundred Eighty-One**
16 **Dollars and Forty-Two Cents (\$123,281.42)** to be paid within sixty (60) days of execution of this
17 Stipulation (the "Second Settlement Payment").

18 **c)** Following receipt of the Second Settlement Payment and confirmation
19 that the First Settlement Payment and Second Settlement Payment have been paid by the banks upon
20 which they were drawn, Fuller shall assign its claim in the bankruptcy proceeding of EAI
21 International, referred to as *In RE EAI INTERNATIONAL, INC.*, United States Bankruptcy Court for
22 the Northern District of California Case No. 04-45829LT11 (the "EAI Bankruptcy Proceeding"), to
23 Zoucha.

24 **d)** In addition to the First and Second Settlement Payments, Zoucha shall
25 assign and pay to Fuller **Sixty-Two Thousand Dollars (\$62,000.00)** to be paid from the first dollars
26 recovered by Zoucha from the EAI Bankruptcy Proceeding (the "Third Settlement Payment").
27 Zoucha shall use all best efforts to effect this recovery and payment to Fuller.

2. The term "execution" as provided in this Agreement shall mean the date on which the Agreement was signed by either Fuller or Zoucha, whichever is later.

3. All settlement checks in the amounts set forth above shall be made payable to Pete Fuller dba Pete Fuller Construction and the law firm representing him, McDonough Holland & Allen PC, and delivered to Fuller's counsel;

4. After 91 days following the latter of (1) payment of the Second Settlement Payment by the bank upon which it was drawn; (2) payment of the Third Settlement Payment by the bank upon which it was drawn; or (3) the conclusion of the EAI Bankruptcy Proceeding if Zoucha fails to recover from that proceeding, Fuller will cause a dismissal with prejudice to be filed in the Action.

5. The Action, including the deadlines for discovery and all dispositive motions, including, but not limited to the deadline for motions for summary judgment, shall be stayed from the date of the full execution of this Stipulation until the latter of dismissal of the Action as provided above, or Fuller's notice to the Court, served on Zoucha, that Zoucha has failed to perform the terms of this Stipulation and that the Action may proceed.

6. The United States District Court for the Eastern District of California shall retain jurisdiction to enforce the terms of this Stipulation.

B. GENERAL MUTUAL RELEASE

1. Excepting only the obligations of the Stipulation, and the limitations stated in subsection 3 below, Fuller, and each of its officers, directors, shareholders, partners, employees, representatives, successors, affiliated companies, subsidiaries, and assignees hereby release, discharge, and covenant not to sue Zoucha, and each of his agents, employees, heirs, executors, administrators, successors-in-interest, officers, directors, shareholders, attorneys, insurers, owners, representatives, and assigns from any and all claims, demands, actions, liabilities, damages, and causes of action, including costs and attorney fees, in regard to or in any way arising from or relating to the Projects and the Action. Fuller understands that, with the exception of the obligations of the Stipulation and the limitations stated in subsection 3, below, this release extends to any and all

1 claims, demands, actions and causes of action of any and every kind or nature whatsoever,
2 contractual, tortious, or otherwise, present or future, known or unknown, contemplated or
3 uncontropted, in connection with or in any way arising from or relating to the Projects or the
4 Action.

5 2. Excepting only the obligations of the Stipulation and the limitations stated in
6 subsection 3 below, Zoucha and each of his agents, employees, heirs, executors, administrators,
7 successors-in-interest, officers, directors, shareholders, attorneys, insurers, owners, representatives,
8 and assigns hereby release, discharge, and covenant not to sue Fuller and each of its officers,
9 directors, shareholders, partners, employees, representatives, successors, affiliated companies,
10 subsidiaries, agents, attorneys, and sureties, from any and all claims, demands, actions, liabilities,
11 damages, and causes of action, including costs and attorney fees, in regard to or in any way arising
12 from or relating to the Projects and the Action. Zoucha understands that, with the exception of the
13 obligations of the Stipulation and the limitations stated in subsection 3, below, this release extends to
14 any and all claims, demands, actions and causes of action of any and every kind or nature
15 whatsoever, contractual, tortious, or otherwise, present or future, known or unknown, contemplated
16 or uncontropted, in connection with or in any way arising from or relating to the Projects or the
17 Action.

18 3. The releases stated herein shall not apply to claims arising out of (1) latent
19 deficiencies, as defined by Code of Civil Procedure section 337.15; (2) bodily injury or death
20 suffered by any person; or (3) unexpired warranties on the Projects.

21 **C. COMPROMISE OF A DISPUTED CLAIM**

22 It is understood and agreed that this settlement involves a compromise of a disputed claim,
23 liability for which is expressly denied by defendants. Neither this settlement, this Stipulation nor
24 any payment of a sum of money due hereunder shall constitute or be deemed or construed as an
25 admission of liability on the part of any releasee.

D. WAIVER UNDER CIVIL CODE SECTION 1542

With the exception of the obligations of the Stipulation and the limitations stated in section B(3), above, it is expressly agreed that the undersigned understand and agree that this full and final release covers and includes all claims of every kind and nature, past, present, or future, known or unknown, suspected or unsuspected, and that all claims under Section 1542 of the Civil Code of the State of California are hereby expressly waived. The undersigned understands that said Section 1542 provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Each of the Parties understands and acknowledges the significance and consequence of this specific waiver of Civil Code Section 1542.

E. ENTIRE AGREEMENT

This Stipulation contains the entire agreement of the Parties and supersedes any prior written or oral agreements between them concerning the subject matters contained herein. No supplement, modification or amendment to this Stipulation shall be binding unless executed in writing.

F. NO REPRESENTATIONS

In making this Stipulation, it is understood and agreed that the Parties rely wholly on their own judgment, belief and knowledge of the nature, extent and duration of the alleged damages and injuries, and that the Parties have not been influenced to any extent in making this Stipulation by any representations or statements regarding alleged damages or regarding any other matter made by the releasees or by any person or persons representing them or any of them. The Parties to this Stipulation hereby declare and represent that they are effecting and executing this Stipulation after having had the opportunity to receive legal advice as to their rights and the significance of this Stipulation from legal counsel of their own choosing.

G. GOOD FAITH SETTLEMENT

In entering into this Stipulation, it is understood and agreed that the Parties, on behalf of their heirs, executors, administrators, agents, officers, directors, shareholders, successors in interest, attorneys, and assigns, acknowledge and agree that the releasees have at all times pertinent hereto

1 negotiated, bargained, and settled this matter in good faith. It is agreed that this settlement shall
2 constitute a "good faith settlement" in accordance with *American Motorcycle Ass'n. v. Sup. Ct.* and
3 its progeny.

4 **H. WARRANTIES**

5 The Parties to this Stipulation hereby represent and warrant that they have not heretofore
6 assigned or transferred, or purported to assign or transfer any claim, demand, action, cause of action,
7 or right herein released or discharged, and as to any such claim or purported claim of assignment
8 which may hereafter arise by any person, firm, corporation, or entity, the Parties will hold one
9 another harmless and agree to defend, indemnify, save and hold the releasee free and harmless.

10 The Parties represent and warrant that they will do all acts and execute and deliver all
11 documents necessary, convenient or desirable to effect all provisions of this Stipulation.

12 **I. GOVERNING LAW**

13 The validity, interpretation and enforcement of this Stipulation shall be governed by the laws
14 of the State of California. The Stipulation shall be enforceable by motion pursuant to California
15 Code of Civil Procedure section 664.6, or by such other procedural mechanisms as may apply.

16 **J. RELEASE BINDING ON HEIRS AND OTHER SUCCESSORS IN INTEREST**

17 This release shall bind and be binding upon the heirs, executors, administrators, subsidiaries,
18 and assigns of the undersigned.

19 **K. EACH PARTY TO BEAR THEIR OWN ATTORNEY'S FEES AND COSTS**

20 The Parties agree, except as contained in the settlement provisions described in section I, that
21 each shall bear her or his or its attorney's fees and costs incurred with respect to the prosecution or
22 defense of this action, including those incurred with respect to the settlement, preparation and
23 execution of this Stipulation and any related documents.

24 In any action or proceeding between or among the Parties to this Stipulation at law or in
25 equity to enforce or otherwise interpret this Stipulation, or for damages by reason of any alleged
26 breach, or for a declaration of rights or obligations, or otherwise related to this Stipulation, the
27 unsuccessful party to that proceeding or action shall pay to the prevailing party, in addition to any
28

other relief that may be granted, all costs and expenses and attorney fees actually and reasonably incurred by the prevailing party relative to that action or proceeding.

L. PROVISIONS SEVERABLE

If any provision of this Stipulation is determined to be invalid or unenforceable, the remainder shall be construed as valid and enforced so as to effectuate the intention of the Parties at the time the settlement was entered into.

IT IS SO STIPULATED:

Dated: _____ PETER A. FULLER, individually
and doing business as Pete Fuller Construction

By: /s/ Pete A. Fuller
PETER A. FULLER

Dated: _____ JAMES E. ZOUCHA

By: /s/ James E. Zoucha
JAMES E. ZOUCHA

Dated: _____ McDONOUGH HOLLAND & ALLEN PC
Attorneys at Law

By: /s/ Erin K. McDonough

ERIN K. McDONOUGH
Attorneys for Plaintiff
Peter A. Fuller, individually and doing business as
Pete Fuller Construction

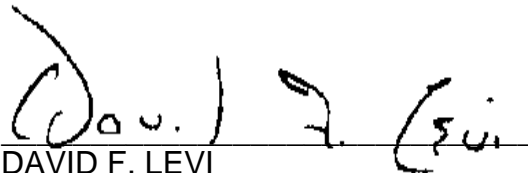
Dated: _____ NAGELEY, MEREDITH & MILLER, INC.

By: /s/ James C. Keowen
JAMES C. KEOWEN
Attorneys for Defendant James E. Zoucha

ORDER

Good cause appearing, IT IS HEREBY ORDERED that the Parties' stipulation is approved, that the Parties shall comply with its terms, that the court shall retain jurisdiction over this matter to fully enforce the terms of this Stipulation and Order, and that the Action, including the deadlines for discovery and all dispositive motions, including, but not limited to the deadline for motions for summary judgment, shall be stayed pending further order of the court or dismissal of the Action.

Dated: 5/18/2006


DAVID F. LEVI
United States District Judge